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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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12 UNITED STATES OF AMERICA,) CV 14-2484-RSWL-PLAx
13 ex rel. TRAVIS KIRO,)
14 Plaintiff,) ORDER re: Relator's
15 v.) Application to File
16 JIAHERB, INC.,) First Amended Complaint
17) [63]; Relator's Motion
18 Defendant.) for Partial Summary
19) Judgment [67];
20) Defendant's Motion for
21) Judgment on the
22) Pleadings [68]
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21 Currently before the Court is Relator Travis Kiro's
22 ("Relator") Application for Leave to File First Amended
23 Complaint [63]; Relator's Motion for Partial Summary
24 Judgment [67]; and Defendant's Motion for Judgment on
25 the Pleadings [68]. Having reviewed all papers
26 submitted pertaining to the Motions, the Court **NOW**
27 **FINDS AND RULES AS FOLLOWS:** the Court **DENIES** Relator's
28 Application for Leave to File First Amended Complaint;

1 **DENIES** Relator's Motion for Partial Summary Judgment;
2 and **DENIES as MOOT** Defendant's Motion for Judgment on
3 the Pleadings.

4 **I. BACKGROUND**

5 **A. Factual Background**

6 This case arises out of a *qui tam* action brought by
7 Relator on behalf of himself in the name of the United
8 States Government ("the Government") for violations of
9 the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*
10 Compl., ECF No. 1. The Government declined to
11 intervene [22].

12 Relator is currently a resident of Texas, but at
13 the time of the acts described in the Complaint, was a
14 resident of Los Angeles, California. Compl. ¶ 7.
15 Relator brings this suit on behalf of the Government,
16 inclusive of the United States Department of Homeland
17 Security, and Bureau of Customs & Border Protection
18 ("CBP"), pursuant to 31 U.S.C. § 3730(b). Id. ¶ 8.
19 Defendant Jiaherb, Inc. ("Defendant") is a New Jersey
20 corporation which does business in California. Id. ¶
21 11. Defendant began its United States operations in
22 early 2008 and, together with its Chinese parent
23 company, Shaanxi Jiahe Phytochem Co., Ltd. ("Shaanxi"),
24 imports Chinese herbal extracts to the nutraceutical,
25 pharmaceutical, cosmetic, and food & beverage
26 industries. Id. ¶ 13. For approximately seven months
27 from January through July 2012, Relator worked as an
28 Account Manager in Defendant's West Coast office. Id.

1 ¶ 9.

2 Under United States laws and regulations relating
3 to the payment of customs duties, when a shipment
4 reaches the United States, the importer of record is
5 required to complete and file certain customs entry
6 documents with CBP, including CBP Form 7501 and a
7 corresponding commercial invoice. Id. ¶ 16. Form 7501
8 lists the various product items included in a shipment,
9 the quantity of each, the price per unit, the tariff
10 classification, and a calculation of the duties owed by
11 the importer. Declaration of John Kinn ("Kinn Decl.")
12 ¶¶ 14-15, ECF No. 78; Ex. 19, Sample 7501 Form, ECF No.
13 80-12. Form 7501 requires that the importer of record
14 or its authorized agent swear under oath that:

15 the merchandise was obtained pursuant to a
16 purchase or agreement to purchase and that the
17 prices set forth in the invoices are true OR was
18 not obtained pursuant to a purchase or agreement
19 to purchase and the statements in the invoices
20 as to value or price are true . . . that the
21 statements in the documents herein filed fully
22 disclose to the best of [their] knowledge and
23 belief the true prices, values, quantities,
24 rebates, drawbacks, fees, commissions, and
25 royalties and are true and correct, and that all
26 goods or services provided to the seller of the
27 merchandise either free or at reduced cost are
28 fully disclosed.

23 Id. ¶ 17. The corresponding commercial invoice is
24 required to set forth the purchase price of each item
25 in the currency of the purchase, and if the merchandise
26 is shipped in pursuance to a purchase or an agreement
27 to purchase. Id. ¶ 18.

1 Relator alleges that from at least as early as
2 2008, and continuing through to the present, Defendant,
3 in conjunction with Shaanxi, has participated in a
4 scheme to evade payment of appropriate United States
5 import duties in connection with the import of
6 Defendant's herbal supplements. Id. ¶ 19. The alleged
7 scheme involves the use of false labels and the filing
8 of false 7501 forms and invoices fraudulently
9 understating the transaction value of the goods being
10 imported. Id. ¶¶ 20-29. According to Relator's
11 allegations, once the duties were paid and the products
12 were cleared by customs, the products were sent to one
13 of Defendant's various warehouses, and then Defendant's
14 New Jersey office sent emails referred to as
15 "relabeling requests" to Defendant personnel at the
16 warehouses. Id. ¶ 40. The "relabeling request" emails
17 attached the proper labels for the products. Id. ¶ 41.
18 Relator alleges that the California office replaced the
19 fraudulent labels with the new labels sent via email
20 from New Jersey. Id. ¶ 42. Relator alleges that the
21 only function of the fraudulent invoices and 7501 forms
22 is to deceive CBP and thereby reduce Defendant's import
23 duties. Id. ¶ 43. Relator claims he has direct,
24 personal knowledge of the scheme because through his
25 employment, he personally saw the relabeling at the
26 West Coast locations. Id. ¶ 59.

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1 **B. Procedural Background**

2 Relator filed his Complaint on April 2, 2014 [1]
3 alleging violations of FCA. On October 14, 2016, the
4 Government declined to intervene [22]. On April 18,
5 2019, Relator filed the instant Application to File a
6 First Amended Complaint ("FAC") [63]. Defendant timely
7 opposed [69] and Relator timely replied [75]. On April
8 26, 2019 Relator filed the instant Motion for Partial
9 Summary Judgment as to Liability [67]. That same day,
10 Defendant filed a Motion for Judgment on the Pleadings
11 [68]. Both parties timely opposed [74, 77], and timely
12 replied [81, 82] to the Motions.

13 **II. DISCUSSION**

14 **A. Legal Standard**

15 1. Judgment on the Pleadings

16 Federal Rule of Civil Procedure 12(c) states that
17 "[a]fter the pleadings are closed—but early enough not
18 to delay trial—a party may move for judgment on the
19 pleadings." Judgment on the pleadings is appropriate
20 "when, taking all the allegations in the non-moving
21 party's pleadings as true, the moving party is entitled
22 to judgment as a matter of law." Ventress v. Japan
23 Airlines, 486 F.3d 1111, 1114 (9th Cir. 2007) (quoting
24 Fajardo v. Cty. of L.A., 179 F.3d 698, 699 (9th Cir.
25 1999)). While the allegations of the non-moving party
26 must be accepted as true, any allegations made by the
27 moving party that have been denied or contradicted are
28 assumed to be false. MacDonald v. Grace Church

1 Seattle, 457 F.3d 1079, 1081 (9th Cir. 2006); Hal Roach
2 Studios v. Richard Feiner & Co., 896 F.2d 1542, 1550
3 (9th Cir. 1989) (citing Doleman v. Meiji Mut. Life Ins.
4 Co., 727 F.2d 1480, 1482 (9th Cir. 1984)). The facts
5 are viewed in the light most favorable to the
6 non-moving party, and all reasonable inferences are
7 drawn in favor of that party. Living Designs, Inc. v.
8 E.I. DuPont de Nemours & Co., 431 F.3d 353, 360 (9th
9 Cir. 2005). Dismissal is proper "only if it is clear
10 that no relief could be granted under any set of facts
11 that could be proved consistent with the allegations."
12 Turner v. Cook, 362 F.3d 1219, 1225 (9th Cir. 2004)
13 (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514
14 (2002)).

15 "[J]udgment on the pleadings is improper when the
16 district court goes beyond the pleadings to resolve an
17 issue; such a proceeding must properly be treated as a
18 motion for summary judgment." Hal Roach Studios, 896
19 F.2d at 1550 (citing Fed. R. Civ. P. 12(c)). However,
20 the court may consider facts subject to judicial
21 notice. Heliotrope Gen., Inc. v. Ford Motor Co., 189
22 F.3d 971, 981 n.18 (9th Cir. 1999).

23 2. Partial Summary Judgment

24 Federal Rule of Civil Procedure 56(a) states that a
25 "court shall grant summary judgment" when "the movant
26 shows that there is no genuine dispute as to any
27 material fact and the movant is entitled to judgment as
28 a matter of law." A fact is "material" for purposes of

1 summary judgment if it might affect the outcome of the
2 suit, and a "genuine" issue exists if the evidence is
3 such that a reasonable fact-finder could return a
4 verdict for the nonmovant. Anderson v. Liberty Lobby,
5 Inc., 106 S. Ct. 2505, 2510 (1986). The evidence, and
6 any inferences based on underlying facts, must be
7 viewed in the light most favorable to the nonmovant.
8 Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d
9 1327, 1328-29 (9th Cir. 1983). In ruling on a motion
10 for summary judgment, the court's function is not to
11 weigh the evidence, but only to determine if a genuine
12 issue of material fact exists. Anderson, 106 S. Ct. at
13 2513.

14 Where the nonmovant bears the burden of proof at
15 trial, the movant need only prove that there is no
16 evidence to support the nonmovant's case. In re Oracle
17 Corp. Secs. Litig., 627 F.3d 376, 387 (9th Cir. 2010).
18 If the movant satisfies this burden, the burden then
19 shifts to the nonmovant to produce admissible evidence
20 showing a triable issue of fact. Id.; Nissan Fire &
21 Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03
22 (9th Cir. 2000); see also Cleveland v. Policy Mgmt.
23 Sys. Corp., 119 S. Ct. 1597, 1603-04 (1999) (quoting
24 Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986)).

25 Federal Rule of Civil Procedure 56 authorizes
26 courts to grant partial summary judgment to limit the
27 issues to be tried in a case. State Farm Fire & Cas.
28 Co. v. Geary, 699 F. Supp. 756, 759 (N.D. Cal. 1987)

(citing Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981)); see, e.g., White v. Lee, 227 F.3d 1214, 1240 (9th Cir. 2000) ("[A] court may award a partial summary judgment that decides only [the] issue [of liability]."). Absent special circumstances, partial summary judgment is not appealable prior to the entry of a final judgment because such orders do not dispose of all claims or end the litigation on the merits. Williamson v. UNUM Life Ins. Co. of Am., 160 F.3d 1247, 1250 (9th Cir. 1998) (citations omitted).

B. Discussion

1. Relator's Motion to File FAC

Relator seeks leave to file an FAC alleging a new theory of liability under 31 U.S.C. § 3729(a)(1)(G). Specifically, Relator seeks to incorporate a theory under the "Seller Relationship Issue," alleging that in submitting the 7501 Forms to CBP, Defendant misrepresented that it was not related to the seller, when in fact the seller is Defendant's parent company, Shaanxi. Relator's Appl. to File FAC ("FAC Appl.") 2:6-14, ECF No. 63-1.

The Federal Rules of Civil Procedure ("Rule") state that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a)(2). "The decision of whether to grant leave to amend nevertheless remains within the discretion of the district court, which may deny leave to amend due to 'undue delay, bad faith or dilatory motive on the part of the movant, repeated

1 failure to cure deficiencies by amendments previously
2 allowed, undue prejudice to the opposing party by
3 virtue of allowance of the amendment, [and] futility of
4 amendment.'" Leadsinger, Inc. v. BMG Music Pub., 512
5 F.3d 522, 532 (9th Cir. 2008) (quoting Forman v. Davis,
6 83 S. Ct. 227, 230 (1962)). Neither party argues that
7 Relator brings this Motion in bad faith, and Relator
8 has not previously amended his Complaint.

9 a. *Undue Delay*

10 Relator filed his initial Complaint on April 2,
11 2014. Relator contends that he first learned of this
12 new theory of liability in June 2017, because that was
13 when Defendant began producing inconsistent 7501 Forms
14 during discovery, and Relator discovered that on some
15 forms Defendant indicated it was related to the seller,
16 and on some forms it indicated it was not related. FAC
17 Appl. at 4:4-19. Despite discovering this in 2017,
18 Relator waited another near two years before requesting
19 leave to amend to incorporate this new theory. Other
20 than arguing that this time was spent reviewing the
21 documents, many of which had to be translated from
22 Chinese, Relator offers no other explanation for such a
23 long delay. Rel.'s Reply ISO FAC Appl. ("FAC Reply")
24 2:2-17, ECF No. 75. While the Court acknowledges time
25 is needed to review documents, the Court finds that
26 nearly two years from first discovering the relevant
27 7501 forms is an unreasonable delay. See
28 AmerisourceBergen Corp v. Dialysist West, Inc., 465

1 F.3d 946, 953 (9th Cir. 2006) (citing Texaco, Inc. v.
2 Ponsoldt, 939 F.2d 794, 799 (9th Cir. 1991) ("We have
3 held that an eight month delay between the time of
4 obtaining a relevant fact and seeking a leave to amend
5 is unreasonable."). "Undue delay by itself, however,
6 is insufficient to justify denying a motion to amend."
7 Bowles v. Reade, 198 F.3d 752, 758 (9th Cir. 1999)
8 (citation omitted). Thus, while this factor weighs
9 against granting leave to amend, the Court must
10 consider it in conjunction with the remaining factors.

11 b. *Prejudice*

12 "[I]t is the consideration of prejudice to the
13 opposing party that carries the greatest weight."
14 Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048,
15 1052 (9th Cir. 2003); DCD Programs, Ltd. v. Leighton,
16 833 F.2d 183, 185 (9th Cir. 1987). Relator argues
17 there is no prejudice to Defendant because Defendant
18 was on notice of the new theory since 2017, and because
19 allowing amendment would not require a reopening of
20 discovery.

21 First, Relator argues that questions relating to
22 the Seller Relationship Issue were asked at both
23 Relator's July 2, 2018 deposition and Defendant's July
24 12, 2018 deposition. Relator specifically points out
25 that "Topic Number 8" on Relator's July 2, 2018
26 deposition concerned Defendant's communications with
27 its customs brokers regarding whether to state that
28 Defendant was related to the seller on the 7501 forms.

1 FAC Reply at 5:22-27. However, in deposing Relator,
2 Defendant's counsel asked "only a few minutes of
3 questions" regarding the Seller Relationship Issue,
4 during which Relator denied any knowledge of the 7501
5 form, could not say he knew anything of the
6 "relationship" portion of the form, and admitted that
7 this new issue was unrelated to his original Complaint.
8 Declaration of John Kinn ISO Def.'s Opp'n to FAC Appl.
9 ("FAC Kinn Decl.") ¶ 5, ECF No. 70; Ex. 3 at 307:17-
10 312:10, 319:22-320:18, ECF No. 70-1. The Court is
11 unconvinced that based upon these answers, Defendant
12 should have been on notice that Relator was intending
13 to pursue the Seller Relationship Issue as a new theory
14 of liability. If anything, Relator's answers indicate
15 the exact opposite. Similarly, Relator's counsel only
16 asked a few questions at Defendant's witness deposition
17 regarding this theory.¹ FAC Kinn Decl. ¶ 4. Simply
18 because Relator asked questions regarding the Seller
19 Relationship Issue does not necessarily indicate to
20 Defendant that Relator would pursue the issue as a
21 theory of liability, for depositions can last seven

23 ¹ In one instance, Defendant's witness confirmed that he had
24 no involvement with the explanation of whether Defendant was
25 related to the seller, and Relator's counsel moved on to
26 different questioning. Kinn Decl, Ex. 1 61:2-25, ECF No. 70-1.
27 Later in the same deposition, Defendant's witness was shown a
28 7501 form and stated he was unaware that the form required
information on whether there was a relationship. Id. at 74:17-
75:11. Defendant's witness then testified that Defendant does
not handle "these kinds of things" and relies on its professional
customs broker to fill out the forms. Id. at 75:12-76:22.

1 hours a day and can cover a wide range of questions
2 that do not end up being material to litigation.
3 Indeed, the vast majority of questioning at deposition
4 focused on the specific, pleaded examples of
5 mislabeling alleged in the original Complaint. See
6 Kinn Decl., Ex. 3 at 224:1-235:24; Ex. 4. The Court
7 finds this insufficient to provide notice to Defendant
8 that Relator intended to bring the Seller Relationship
9 Issue as a legal theory.

10 Relator also argues that there is no prejudice
11 because no further discovery is needed. Relator points
12 out that in both Defendant's Opposition to Relator's
13 concurrently filed Motion for Partial Summary Judgment,
14 and Defendant's concurrently filed Motion for Judgment
15 on the Pleadings, Defendant has requested the Court to
16 rule on the Seller Relationship Issue as a matter of
17 law based on the evidence that is already before the
18 Court. FAC Reply 3:14-18. Relator further points out
19 that Defendant has already submitted a declaration from
20 its customs broker, and that Relator believes it does
21 not need to depose the broker and that the Court has
22 all the information it needs on the issue. Id. at
23 3:20-4:13. The Court is not persuaded by Relator's
24 arguments. The concurrently filed Motions were filed
25 on April 26, 2019, the same day as the motion filing
26 deadline in this case. The extent to which Defendant
27 addressed the new theory in both concurrently filed
28 Motions was to primarily argue that the new cause of

1 action is futile. Further, Relator is not in the
2 position to say whether one customs broker declaration
3 is enough for Defendant to adequately defend this
4 issue. Defendant's inclusion of the new theory in its
5 other two Motions does not indicate that Defendant will
6 not need any further discovery, but rather it appears
7 that Defendant addressed the issue to the extent it
8 could with the information before it at the time to
9 still abide by the motion filing deadline. Moreover,
10 the Government filed a Statement of Interest requesting
11 that should the Court grant leave to amend, it should
12 order the FAC sealed for at least sixty days to allow
13 the Government to investigate the new allegations
14 because the proposed FAC contains "new allegations"
15 that are not substantially similar to the original
16 Complaint. Government's Statement of Interest 1:13-17,
17 ECF No. 65. Not only would this delay trial, but the
18 Government's Statement also suggests that because there
19 is a need for investigation given that these new
20 allegations that are not substantially similar, there
21 will also be a need to reopen discovery.

22 Discovery closed on January 18, 2019, and trial is
23 set for July 9, 2019. Adding a new theory of liability
24 at this late stage in litigation would push this trial
25 out further, and risk the need to reopen discovery.
26 See Jackson v. Bank of Haw., 902 F.2d 1385, 1388 (9th
27 Cir. 1990) (citation omitted) ("Putting the defendants
28 through the time and expense of continued litigation on

1 a new theory, with the possibility of additional
2 discovery, would be manifestly unfair and unduly
3 prejudicial.'"). Because Relator waited nearly two
4 years to bring this new theory, after discovery closed
5 and mere weeks before trial, the Court finds that
6 prejudice would result if it were to allow amendment.
7 See Morongo Band of Mission Indians v. Rose, 893 F.2d
8 1074, 1079 (9th Cir. 1990) (denying request to add new
9 claims two years later because it would be a "radical
10 shift" of "tenuous nature" and "inordinate delay").
11 The Court need not address futility given that undue
12 delay and the risk of prejudice—the most important
13 factor—weigh so heavily against allowing amendment.
14 See Solomon v. North American Life & Cas. Ins. Co., 151
15 F.3d 1132, 1139 (9th Cir. 1998) (finding a motion "on
16 the eve of discovery deadline" properly denied because
17 it would have required reopening discovery, thus
18 delaying proceedings); Campbell v. Emory Clinic, 166
19 F.3d 1157, 1162 (11th Cir. 1999) ("Prejudice and undue
20 delay are inherent in an amendment asserted after the
21 close of discovery and after dispositive motions have
22 been filed, briefed, and decided."). Consequently, the
23 Court **DENIES** Relator's Application to File FAC.

24 2. Defendant's Motion for Judgment on the
25 Pleadings

26 Defendant moves for judgment on the pleadings
27 solely as to Relator's new Seller Relationship theory
28 he seeks to bring in his proposed FAC. See Def.'s Mot.

1 re J. on the Pleadings, ECF No. 68. Because the Court
2 denied Relator's Application to File the FAC, this new
3 claim is not before the Court. As such, the Court
4 **DENIES as MOOT** Defendant's Motion for Judgment on the
5 Pleadings.

6 3. Relator's Motion for Partial Summary Judgment

7 Relator seeks partial summary judgment as to
8 Defendant's liability under the False Claims Act
9 ("FCA"), 31 U.S.C. § 3729(a)(1)(G). To establish
10 liability under this section of the FCA, a plaintiff
11 must prove that defendant "knowingly makes, uses, or
12 causes to be made or used, a false record or statement
13 material to an obligation to pay or transmit money or
14 property to the Government, or knowingly conceals or
15 knowingly and improperly avoids or decreases an
16 obligation to pay or transmit money or property to the
17 Government". 31 U.S.C. § 3729(a)(1)(G). These types
18 of claims are called "reverse false claims." U.S. ex
19 rel. Cafasso v. General Dynamics C4 Sys., Inc., 637
20 F.3d 1047, 1056 (9th Cir. 2011). The FCA's reverse
21 false claims provision "attempts to provide that
22 fraudulently reducing the amount owed to the government
23 constitutes a false claim." Id. (internal quotation
24 marks omitted).

25 Here, Relator alleges a scheme in which Defendant
26 submitted fraudulent Customs 7501 Forms and invoices to
27 CBP that falsely represented the identity and value of
28 Defendant's herbal supplements, in order to be assessed

1 a lower duty for the import of the materials than was
2 lawfully owed based on the actual identity of the
3 materials. Compl. ¶¶ 16-20. As part of the scheme,
4 Relator alleges that once duties were paid and cleared
5 by customs, Defendant's New Jersey office sent emails
6 referred to as "relabeling requests" to Defendant's
7 California offices and warehouses, which attached the
8 proper label for each import with the correct
9 identification and price to replace the fraudulent one.
10 Id. ¶¶ 22, 39-42.

11 Defendant does not dispute that it has changed
12 labels due to varying reasons, including damaged or
13 ripped labels, incorrect labels, and customer requests.
14 Def.'s Stmt. of Genuine Disputes, ("SGDF") ¶ 4, ECF No.
15 80; id., Ex. 23, Chen Dep. 26:22-27:3, ECF No. 80-16
16 (testifying that label change could be China's mistake,
17 damage in transportation, customer has special need,
18 warehouse messed up, etc.). Defendant does however
19 dispute that it ever intentionally placed a false label
20 onto any imported goods or that Defendant undervalued
21 its imports to avoid customs duties. Def.'s Opp'n to
22 Rel.'s Mot. re Summ. J. ("MSJ Opp'n") 7:26-28, ECF No.
23 77; Declaration of John Kinn ISO Def.'s MSJ Opp'n
24 ("Kinn Decl.") 2:5-18, ECF No. 78. The FCA defines
25 knowingly to mean that a "defendant knew a claim for
26 payment was false, or that it acted with reckless
27 disregard or deliberate indifference as to the truth or
28 falsity of the claim." United States ex rel. Anita

1 Silingo v. WellPoint, Inc., 904 F.3d 667, 680 (9th Cir.
2 2018). Relator argues that, at a minimum, Defendant
3 acted with reckless disregard or deliberate
4 indifference that many of its imported products were
5 falsely identified to CBP and that Defendant never
6 notified CBP of these false statements. Rel.'s Mot. re
7 Summ. J. ("Rel.'s MSJ") 9:17-26, ECF No. 67-1.
8 Defendant argues that Relator presents no admissible
9 evidence that it acted knowingly, with deliberate
10 indifference, or reckless disregard. Thus, the crux of
11 this issue turns on whether Relator has shown there is
12 no genuine dispute of material fact that Defendant
13 *knowingly* submitted false statements under the FCA.

14 Relator largely rests his case on his own
15 declaration, in which he contends that Shaanxi shipped
16 imports to Defendant's warehouse in Buena Park,
17 California, with false labels and invoices. Rel.'s MSJ
18 Ex. E, Declaration of Travis Kiro ("Kiro Decl.") ¶¶ 10-
19 12, ECF No. 67-8. For example, Relator states that a
20 shipment labeled as containing green tea powder, a
21 "cheap product" in his experience, might actually
22 contain a "very concentrated high-potency extract made
23 from green tea" that is "regularly sold for more than
24 ten times the market price of the non-concentrated
25 powder." Id. ¶ 13. Relator provides that during his
26 employment, other invoices listed lower-priced raw
27 materials—such as turmeric, parsley, celery seed,
28 bilberry, white tea, guarana, hibiscus, and griffonia

1 powder—because they are “relatively cheap”, when
2 Defendant was actually importing high-priced extracts
3 such as green coffee bean extract, 5-HTP 98% and 99%,
4 raspberry ketones, resveratrol, and turmeric 95%. Id.
5 ¶¶ 14-15. Additionally, Relator states that he
6 reviewed “hundreds” of the “relabeling requests” that
7 were sent once the duties were paid based on the
8 fraudulent labels as well as Defendant’s “Fishbowl
9 computer system,” where Defendant tracks the “label-
10 switching scheme”. Id. ¶¶ 21-24, 32.

11 As an initial matter, Defendant objects to
12 Relator’s declaration and argues that the Court should
13 strike it as unauthenticated, lacking personal
14 knowledge, and containing impermissible legal
15 conclusions and hearsay statements.² Def.’s MSJ Opp’n
16 at 5:22-6:4. Relator offers his declaration as a “non-
17 retained testifying expert report” pursuant to Rule
18 26(a)(2)(C). Declaration of Cory Fein ISO Summ. J.
19 (“Fein Decl.”) ¶ 7, ECF No. 67-2; Kiro Decl. ¶ 3.
20 Federal Rule of Evidence (“FRE”) 703 provides that

21
22 ² Defendant did not file separate evidentiary objections,
23 but instead includes its evidentiary objections within its SGDF.
24 However, the Court will not address each objection as they are
25 largely “boilerplate and devoid of any specific argument or
26 analysis as to why any particular exhibit or assertion
27 in a declaration should be excluded.” United States v.
28 HIV Cat Canyon, Inc., 213 F. Supp. 3d 1249, 1257 (C.D.
Cal. 2016); see also Stonefire Grill, Inc. v. FGF
Brands, Inc., 987 F. Supp. 2d 1023, 1033 (C.D. Cal.
2013) (refusing to “scrutinize each objection and give a
full analysis of identical objections”). Where Defendant does
make specific objections, and the Court relies on such evidence,
the Court will address Defendant’s objections.

1 "[a]n expert may base an opinion on facts or data in
2 the case that the expert has been made aware of or
3 personally observed." Relator states that he has
4 direct, personal knowledge of the alleged scheme
5 through his former employment as Account Manager in
6 Defendant's West Coast office from January to July,
7 2012, and that as part of his position, he personally
8 saw relabeling take place. Kiro Decl. ¶ 42.

9 Additionally, Relator has worked in the nutraceutical
10 industry from 2001 to present, although he does not
11 submit a resume or detail his experience. Id. ¶ 6.

12 Defendant argues that Relator lacks personal
13 knowledge regarding Defendant's product pricing or
14 calculation of import duties. SGDF ¶ 3. For example,
15 Defendant points to Relator's deposition, specifically
16 where he was asked how he knows the relabeling was done
17 to change the labels from cheaper to more expensive
18 because the labels do not show a price. Id., Ex. 22,
19 Kiro Dep. 178:6-25, ECF No. 80-15. Relator answered
20 that he could look it up on a price list, but admitted
21 that he had not looked on price lists during the
22 relevant period of time to see if duties were
23 underpaid. Id. at 178:1-10. Defendant further points
24 to several portions of the Declaration of Ying Chen,
25 the lead of operations for Defendant in the United
26 States. Declaration of Ying Chen ISO Def.'s MSJ Opp'n
27 ("Chen Decl."), ECF No. 79. Relator's declaration
28 contains statements that products are "cheap" or

1 "expensive," but Chen states that products cannot be
2 generalized that way without identifying their
3 specification. Chen Decl. ¶ 12. For example, Bilberry
4 Extract Anthocyanidins UV and Bilberry Extract
5 Anthocyanins HPLC may cost several hundred dollars per
6 kilogram, Bilberry Extract Anthocyanins at a lower
7 percentage HPLC may cost a few hundred dollars per
8 kilogram, but Bilberrry Extract at a simple ratio may
9 cost only a few dollars per kilogram. Id. All are
10 "Bilberry Extract" imports, but the cost depends on
11 specifications, percentages, active ingredients, etc.,
12 thus Chen asserts that Relator is too generic by
13 calling products like "Bilberry" a relatively "cheap
14 raw product." Id.

15 Finally, Defendant argues that Relator's
16 declaration relies on impermissible hearsay statements.
17 Relator states that Jesse Sevilla, the manager of
18 States Logistics, the California warehouse Defendant
19 uses, told Relator that Defendant "routinely asked us
20 to relabel their products; I'm going to say about 60%,
21 or higher, of their shipments were relabeled." Id. ¶
22 25. Relator also states that Skipp Silverman,
23 presumably another employee of Defendant, told him how
24 the scheme worked and that the reason was "to evade
25 payment of proper U.S. customs duties," that it was
26 "standard procedure," and the "way it has always been
27 done." Id. ¶ 43. Dick Askinazi from AMS also
28 purportedly explained the relabeling scheme to Relator.

1 Id. Yet nowhere does Relator provide a declaration or
2 any evidence supporting these hearsay statements.
3 Ordinarily, such hearsay statements would not satisfy
4 the requirement of Rule 56(e) that a declaration must
5 "set out facts that would be admissible in evidence".
6 See Scosche Indus., Inc. v. Visor Gear Inc., 121 F.3d
7 675, 681 (9th Cir. 1997) (finding declaration in
8 opposition to summary judgment containing hearsay
9 insufficient). However, FRE 703 permits hearsay, or
10 other inadmissible evidence, upon which an expert
11 properly relies, to be admitted to explain the basis of
12 the expert's opinion. See H.I.S.C., Inc. v. Franmar
13 Int'l Imps., Ltd., No. 3:16-cv-00480-BEN-WVG, 2018 U.S.
14 Dist. LEXIS 214537, at *14 (S.D. Cal. Dec. 19, 2018)
15 (citing Paddack v. Dave Christensen, Inc., 745 F.2d
16 1254, 1261-62 (9th Cir. 1984)).

17 At this stage, the Court declines to strike
18 Relator's declaration for lack of personal knowledge.
19 The extent of Relator's knowledge and experience in the
20 nutraceutical industry presents a question of fact for
21 the jury in determining the credibility of Relator.
22 Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F.3d
23 1252, 1263 (9th Cir. 2001) ("[I]ssues of methodology,
24 survey design, reliability, the experience and
25 reputation of the expert, critique of conclusions, and
26 the like go to the weight of the survey rather than its
27 admissibility."). Further, to the extent Relator is an
28 expert, the hearsay statements do not render his

1 declaration inadmissible.

2 That being said, the objections and arguments
3 Defendant brings as to Relator's declaration, primarily
4 through Chen, do raise a genuine issue of material fact
5 as to whether Defendant knowingly mislabeled its
6 shipments to avoid duties. Chen states that he is "not
7 aware of any underpayment of duties" and that "[t]o the
8 extent some imports were mislabeled in China or needed
9 relabeling for other reasons, the prices on the
10 Commercial Invoices reflected the price for the actual
11 product imported." Chen Decl. ¶ 8. Moreover, as
12 previously discussed, Chen points to the exact
13 specifications of the herbal supplements as a factor
14 affecting pricing that he argues Relator does not have
15 adequate knowledge of.

16 Further, Relator does not specify any actual
17 evidence to support the assertions in his declaration
18 and states his knowledge of the alleged scheme in the
19 form of generalizations and hypothetical examples,
20 while Chen's declaration directly challenges and
21 contradicts Relator's statements. Conclusory or
22 speculative testimony in affidavits or declarations is
23 insufficient at summary judgment. See Thornhill Publ'g
24 Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).
25 Where Relator does mention specific evidence, he cites
26 to his own summary of documents produced in two boxes
27
28

1 by States Logistics.³ Kiro Decl. ¶ 25. Included in
2 Relator's summary are references to the "relabeling
3 request" emails Defendant allegedly sent to its
4 employees.⁴ Relator provides that in the examples
5 discussed in his summary, the product listed on the
6 fake label is different (and less expensive) than the
7 product listed on the correct label placed on the
8 container after it cleared customs. Kiro Decl. ¶ 30.

9 For some relabeling allegations, Relator lays out
10 for each shipment the "Bill of Lading" date; the "Order
11 Pick Sheet" number, date, and label title; that an
12 email directed changing the labels; and the box and
13 folder number that corresponds to the documents
14 received from State Logistics. Kiro Decl. at 15-18.
15 The majority of Relator's summary, however, lists
16 instances of relabeling in the form of a one sentence

17
18 ³ Relator relied upon these documents to form his opinion,
19 but given the volume of documents, he only submitted a summary to
20 support his declaration, pursuant to FRE 1006, which provides
21 that a "proponent may use a summary, chart, or calculation to
22 prove the content of voluminous writings . . . that cannot be
23 conveniently examined in court." Relator made the documents
24 available to Defendant and will produce them in court if
requested. Rel.'s Reply at 9:8-22. For now, Relator provides a
sampling of the State Logistics documents as exhibits to the Fein
Declaration ISO Rel.'s Reply, ECF No. 81-1: (1) Ex. D1, B1F1; (2)
Ex. D2, B1F2; (3) Ex. D3, B1F3; (4) Ex. D4, B1F16; (5) Ex. D5,
B2F15; (6) Ex. D6, B2F16; (7) Ex. D7, B2F19.

25 ⁴ During discovery, Defendant failed to produce its emails
26 containing the "relabeling requests" due to a "regular
27 destruction policy" by which Defendant's email cloud service
28 provider is unable to recover emails after fourteen days. Kinn
Decl. ¶ 8. Through the use of a subpoena on State Logistics,
Relator was able to retrieve the emails. Fein Decl. ¶¶ 3-7; id.,
Exs. A-B.

1 statement with no explanation of which invoices or
2 forms his summary refers to. For example, in his
3 declaration, Relator states that the Fishbowl computer
4 records show that turmeric extract, an "expensive
5 extract", was falsely described as the "much cheaper
6 turmeric powder" to Customs. Id. ¶ 35; see id., Ex. A
7 ¶ 65, B1F7, B2F2, B2F4, B2F6, and B2F9. Relator cites
8 to B1F7, referring to box one, folder seven, but his
9 summary merely provides one line reading "Robinson
10 Pharma Turmeric Powder relabeled as Turmeric extract,
11 relabel instructions in bold." Id. at 22.

12 Relator's summary of the documents on its own is an
13 insufficient basis to show that there is no genuine
14 issue of material fact as to Defendant's liability.
15 Upon review of the "relabeling request" emails provided
16 to the Court, it appears that each email generally
17 contains the same instruction from Defendant's New
18 Jersey office to "[p]lease remove labels from boxes and
19 replace with attached," with no reason stated as to
20 why. See Reply ISO Rel.'s MSJ, Ex. D1, ECF No. 81-5.
21 Chen testified at deposition that these "relabeling
22 request" emails notified Defendant when there was a
23 shipment mislabeled with "the wrong product name or
24 wrong lot number or the spelling is wrong or sometimes
25 from the warehouse they say, oh, it's broken, then we
26 inform our warehouse to change it." SGDF Ex. 23, Chen.
27 Dep. 16:10-14, ECF No. 80-16. Chen testified that
28 these were not intentional mislabeling, but that

1 Defendant has "too many shipments, too many products;
2 it's normal they make mistakes." Id. at 17:12-13. The
3 parties dispute the varying reasons for a need to
4 replace the labels, and these emails do not shed light
5 either way. Ultimately, however, whether Defendant
6 knowingly submitted false statements to CBP turns on
7 whether the labels were replaced due to inadvertent
8 mistake as Defendant claims, or as part of a deliberate
9 scheme as Relator alleges.

10 Defendant submits commercial invoices and 7501
11 Forms that correspond to Relator's examples. See SGDF,
12 Ex. 11, ECF No. 80:1-4. While the invoices show what
13 Defendant purportedly imported and its price, this
14 evidence does not conclusively establish that what was
15 in fact inside the shipments did not correspond to the
16 labels and descriptions seen on the invoices. Nor do
17 the invoices and 7501 Forms prove that Defendant
18 knowingly mislabeled its imports to receive lower
19 duties. Defendant submitted a table listing which
20 exhibit of Relator's that Defendant's invoice and 7501
21 form corresponds to, as well as the commercial invoice
22 purchase order price and the price Defendant later sold
23 it for to its customers. At most, this shows that
24 Defendant largely sold the products to its customers at
25 a higher price than the commercial invoice price—some
26 only a difference of a few dollars—but this does not
27 prove that Defendant fraudulently obtained a lower
28 duty. In viewing this evidence in the light most

1 favorable to Defendant, this could suggest a routine
2 business practice of turning a profit. In fact,
3 Defendant did not always charge customers more than the
4 import price. Chen identifies at least eleven of
5 Relator's examples where Defendant purchased an
6 imported item at a price higher than it sold to its
7 customer. Chen Decl. ¶ 20. And some purchase prices
8 were consistent with the purchase price, for instance,
9 Bilberry Chinese Extract seen in Relator's examples
10 were purchased at prices ranging from \$14-16, and
11 Defendant's related sales varied from \$14-26. Id. at ¶
12 18. According to Chen, to the extent any imports were
13 mislabeled or needed relabeling for other reasons, the
14 prices on the invoices reflected the price for the
15 actual product imported. Chen Decl. ¶ 8. As such,
16 Relator has not shown that no triable issue exists.

17 Neither does the other evidence Relator relies on
18 sufficiently establish that there is no triable issue.
19 First, Relator points to the deposition of Jennifer
20 Solgonick, an employee of Defendant. However, parts of
21 her deposition call into question the probative value
22 of her testimony. For example, Relator argues that
23 Solgonick testified that Defendant relabeled astragalus
24 as licorice root, but she had actually stated that she
25 could not verify this, or what the warehouse received
26 in that shipment. Rel.'s MSJ, Ex. C, Solgonick Dep.,
27 30:2-33:1, ECF No. 67-6; SGDF ¶¶ 27-33. Additionally,
28 Relator points to the deposition of Christopher

1 Oesterheld ("Oesterheld"), another employee of
2 Defendant. See Rel.'s MSJ, Ex. B, Oeasterheld Dep.,
3 ECF No. 67-5. In the portion Relator specifically
4 cites to, Oesterheld was asked whether Defendant ever
5 notified its customs brokers of a mistake on an import
6 label to correct it, and he answered that he does not
7 have any knowledge of that happening. Id. at 39:14-21.
8 This portion on its own, however, does not tend to
9 prove or disprove that Defendant knowingly mislabeled
10 its imports in the first place. Relator does not
11 provide any information as to Oesterheld's position
12 with Defendant and whether he would be privy to such
13 knowledge.

14 In sum, Relator has not provided sufficient
15 evidence showing that there is no genuine dispute that
16 Defendant knowingly mislabeled its shipments to pay
17 lower duties to CBP. United States ex rel. Anderson v.
18 Northern Telecom, 52 F.3d 810, 815 (9th Cir. 1995)
19 ("For a qui tam action to survive summary judgment, the
20 relator must produce sufficient evidence to support an
21 inference of knowing fraud."). If Relator does have
22 such evidence, he has failed to point it out to the
23 Court and instead relies on his own generalized
24 statements and speculations. Both parties dispute
25 Defendant's knowledge and intentions, and Relator has
26 not provided evidence refuting Defendant's argument
27 that the only relabeling that occurred was due to
28 mistake, damage, or client request. See U.S. ex rel.

Hopper v. Anton, 91 F.3d 1261, 1267 (9th Cir. 1996)
("Innocent mistakes, mere negligent misrepresentations
and differences in interpretations are not false
certifications under the [FCA]."). What this case
appears to boil down to is a question of credibility
between Relator's testimony, and Defendant's various
witnesses such as Chen—determinations to be made by the
jury and not the Court on summary judgment. Soremekun
v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir.
2007) ("In judging evidence at the summary judgment
stage, the court does not make credibility
determinations or weigh conflicting evidence."). Thus,
a triable issue exists as to whether Defendant
knowingly imported goods with false labels, and as
such, the Court will not reach the issue of
materiality. Accordingly, the Court **DENIES** Relator's
Motion for Partial Summary Judgment.

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IT IS SO ORDERED.

s/ RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge